Brief of Appellant

FEB 10 1967

United States Court of Appeals

for the Ninth Circuit

No. 20402

MONDAKOTA GAS COMPANY, a corporation,

Appellant,

vs.

COLLINS G. REED and
MRS. COLLINS G. REED, et al,

Appellees.

DARYL E. ENGEBREGSON
JAMES J. PALMERSHEIM
Fratt Building
Billings, Montana
Attorneys for Appellant.

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
Electric Building
Billings, Montana
Attorneys for Appellees.

INDEX

CASES CITED

STATUTES AND RULES

TEXT AUTHORITIES

Brief of Appellant

United States Court of Appeals

for the Ninth Circuit

No. 20402

MONDAKOTA GAS COMPANY, a corporation,

Appellant,

vs.

COLLINS G. REED and
MRS. COLLINS G. REED, et al,

Appellees.

JURISDICTION

Appellants commenced this action in the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon. The action was removed to the United States District Court on the grounds of diversity of citizenship of the parties. There is diversity of citizenship and the amount in controversy exceeds $10,000.00, and the District Court and this Court have jurisdiction under Title 28, U.S.C.A. §1332.

STATEMENT OF THE CASE

The questions involved in this case are whether or not a material issue of fact remains so that summary judgment should not have been granted to the defendant Collins Reed, and secondly, whether or not a new trial should have been granted upon the motion for new trial which includes the question whether or not the District Court should have ordered further discovery procedure during the pendency of the appeal or during the period of hearing the motion for new trial.

These questions are raised first, by the motion for new trial as to the findings of the trial court and by appeal from the summary judgment herein, with reference to the chain of title of the defendant Collins Reed upon which the trial court predicated the judgment against the plaintiff. The question of the motion for new trial will be argued separately and involved therein the questions as to further discovery and the granting of a new trial based upon the showing in the motions and affidavits and particularly the subsequent judgment of the District Court of the State of Montana in and for the

County of Yellowstone, cause No. 28573, entitled Mondakota Gas Co., —vs.— Industrial Gas Inc.,

With reference to the subsequent judgment of the Yellowstone County District Court of the State of Montana, the contract, by which the defendant Collins Reed obtained his title, or claimed to have obtained his title, is fully set forth and recorded in Book 665 of Judgments and Decrees, page ___, on May 17, 1965, of Fallon County wherein the property is located.

The chain of title is as follows:

The chain of title will begin within a common owner, the plaintiff herein, who sold to E. L. McElroy under a purchase agreement covering the real property interest involved herein, situate in Fallon County, Montana, to-wit:

W½, Section 18, Township 8 North,
Range 60 East, M.P.M., and
NE¼, Section 25, Township 8 North,
Range 59 East, M.P.M.

COMMON PREDECESSOR

Mondakota Gas Co. Chain

Purchase Agreement from Mondakota Gas Company (Appellant) to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4 and 24, records, Fallon County, Montana, (Tr. Vol. 1, pg. 21 and 41 herein), recorded Jan. 12, 1953, at 9:35 a.m., (Tr. Vol. 1, pg. 57, herein; Tr. Vol. 1A, pg. 180).

Collins Reed Chain

Purchase Agreement from Mondakota Gas Company (Appellant) to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4 and 24, records, Fallon County, Montana, (Tr. Vol. 1, pg. 21 and 41 herein), recorded Jan. 12, 1953, at 9:35 a.m., (Tr. Vol. 1, pg. 57, herein; Tr. Vol. 1A, pg. 180).

RECORDED INSTRUMENTS IN FALLON COUNTY

Mondakota Gas Co. Chain

Judgment and Decree in case No. 28573, Montana District Court, Yellowstone County, terminating the purchase agreement between Mondakota Gas Co. and Industrial Gas Co. dated June 20, 1953, recorded in Fallon County on May 29, 1954, in Book 34 Misc. Records, pg. 367 (Tr. Vol. 1A, pg. 230, lines 2-7), referring to Purchase Agreement of McElroy set out above (Tr. Vol. 1A, pg. 230, lines 7-19), referring to quit claim deed and assignment of McElroy to Industrial Gas Co. on July 20, 1953, (Tr. Vol. 1A, pg. 230, lines 11-19) and referring to assignment subject to the Purchase Agreement in Book 30, Misc., pg. 4, above, by Mondakota to McElroy (Tr. Vol. 1A, pg. 230, lines 15-19), the Judgment and Decree showing chain of title to the interests claimed by Reed herein (Tr. Vol. 1A, pg. 231, lines 26 to 32, inclusive, and describes said real property and Federal Lease Serial No. 025001 (Walker Lease) (Tr. Vol. 1A, pg.

Collins Reed Chain

None. (Tr. Vol. 1A, pg. 161, lines 21 through 30; Tr. Vol. 1A, pg. 133, lines 11 through 23).

233, lines 3-33 inclusive) and recorded in Book 665 of Judgments and Decrees, pg. ___, on May 17, 1965, in Fallon County, Montana (Tr. Vol. 1A, pg. 225, lines 14-22; and Tr. Vol. 1A, pg. 235).

UNRECORDED INSTRUMENTS

Mondakota Gas Co. Chain

McElroy to Industrial Gas, assignment and deed referred to above; Decree recorded in Book 665 of Judgments and Decrees, pg. ___, on May 17, 1965, in Fallon County, Montana.

Collins Reed Chain

McElroy to Buchtel dated May 28, 1953 (Tr. Vol. 1A, pg. 161, line 25).

Buchtel to Collins Reed dated October 24, 1954 (Tr. Vol. 1A, pg. 161, line 28). These instruments still show, from this transcript herein, to have never been recorded in Fallon County, Montana.

The motion for new trial filed by Mr. Kelleher included affidavits (Tr. Vol. 1A, pg. 167 and 172) wherein it is shown that after trial appellant learned that appellee Collins Reed was a brother-in-law of one Edward Markey, who was a business partner of McElroy (Tr. Vol. 1A, pg. 173) and that McElroy was a brother-in-law of Buchtel (Tr. Vol. 1A, pg. 173).

The affidavits of Smith and Hutchison (Tr. Vol. 1A, pages 216-219) show the act of McElroy in obtaining the assignment which was unrecorded but upon which Reed predicates title through Buchtel. (See Motion re: New Trial, Tr. Vol. 1A, pg. 211.)

SPECIFICATION OF ERRORS

The Appellant relies upon the following specifications of errors which will be urged herein:

1. The court erred in applying res judicata from Case No. 27622, Yellowstone County, Montana, and Case No. 1557 in U. S. District Court and applying Rule 41(b) of the Montana Rules of Procedure.

2. The court erred in failing to find that the defendant, Collins G. Reed, had constructive notice by reason of the recording of the purchase agreement by the Appellant and McElroy in the office of the Fallon County Clerk and Recorder.

3. The court erred in failing to find that the purchase agreement mentioned in 2. above was recorded prior in time to the assignment upon which the defendant Collins G. Reed bases his chain of title.

4. The court erred in failing to find that the assignments numbered 10, 11 and 12 in the judgment were not recorded at all in the office of the County Clerk and Recorder, Fallon County, Montana.

5. The court erred in refusing to grant a new trial based upon newly discovered evidence that McElroy and Markey were business partners, that Buchtel is a brother-in-law of McElroy, and Collins G. Reed, appellee herein, is the brother-in-law of Markey, and all parties named herein had both actual and constructive notice of the purchase agreement reserving title in the appellant including a royalty interest claimed herein by Collins G. Reed and his wife and were not bona fide purchasers of said royalty interests.

6. The court erred in failing to grant the appellant discovery procedure by way of depositions, interroga-

tories and discovery instruments to be used in support of the motion for new trial.

7. The court erred in denying the motion for a new trial as amended.

8. The court erred in denying the motion to amend the motion for new trial dated June 9, 1965, which incorporated a subsequent decree of the Yellowstone County District Court, State of Montana, cause No. 28573, which judgment and decree was recorded in Fallon County, Montana, prior to recording of the assignments upon which Reed bases his chain of title.

9. The court erred in finding that Collins G. Reed, Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company included the royalty interest set forth in paragraphs 10, 11 and 12 of the judgment dated August 31 ,1964, and finding that plaintiff's only interest is the overriding royalties.

10. The court erred in denying the relief prayed for and abused his discretion in failing to grant a new trial in the furtherance of justice (Tr. Vol. 1A, pages 241-243, Statement of Points).

ARGUMENT

In Montana, a quiet title action is proper procedure to litigate rights to oil and gas leases and royalties. See Schumacher v. Cole, 131 Mont. 166, 309 P. 311. A Lis Pendens is filed in the county clerk and recorder's office in the case and constitutes notice to persons seeking to subsequently record an instrument affecting title to the interest involved in litigation. Sec. 93-3005 and 93-6205 R.C.M. 1947.

Montana Rule of Evidence is that a certified copy of a recorded instrument is admissible in evidence the same as the original. See Sec. 93-1101-21, R.C.M. 1947. The trial court had the photo copy before it, and there was a material issue of fact precluding summary judgment against plaintiff, as to Collins Reed (Tr. Vol. 1, pg. 21, 41 and 57).

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner." Sartor v. Arkansas Natural Gas Corp. (1944), 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

> "Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them." Associated Press v. United States (1945), 326 U.S.I., 65 S. Ct. 1416, 89 L. Ed. 2013.

> "The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained." Elgin J. & E. Ry. Co. v. Burley (1945), 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886.

> "A litigant has a right to a trial where there is the slightest doubt as to the facts." Peckham v. Ronrico Corp. (1948 C. A. 1st), 171 F. 2d 653, 657.

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." Doehler Metal Furniture Co. v. United States (CCA 2d, 1945), 149 F 2d 130, 135.

". . . To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds or that conceding its truth, it is without legal probative force . . ."

". . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Whitaker v. Coleman (CCA 5th 1940), 115 F 2d 305.

"° ° ° judgment cannot validly be based upon the summary trial by affidavits" and that parties are entitled to have issues of fact tried at trial "through

introduction of exhibits and witnesses produced for direct and cross-examination." Lane Bryant v. Maternity Lane, Ltd. of California (CA 9th 1949), 175 F 2d 559, 565.

So long as the Plaintiff has given some indication that through his newly discovered evidence he may be able to obtain sufficient evidence by deposition or the taking of testimony in open court in order to support his allegations that there was no consideration for the assignments a New Trial is justified. The movant for a New Trial need not prove by his Affidavit that he is entitled to a verdict but merely showing that he has a right to a trial on the merits.

". . . The showing of the alleged newly discovered evidence need not present an air-tight case. It suffices if a showing is made of sufficient new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details. I believe such a showing has been made here, and it can be left to the matter of proof to supply the specific details." Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713.

"This remedial procedure, a motion for a new trial based upon after-discovered evidence, is designed to serve the ends of justice." Jones vs. U. S. 279 F 2d 433, cert. den. 81 S. Ct.226, 364 U. S.893, 5 L. Ed. 2d 190.

"To grant a new trial for "newly discovered evidence," the new evidence must be something which was unknown at or before the trial, must have been something which could not have been discovered by reasonable diligence and must be something which in its nature would indicate that a new trial would be more favorable to the movant, and must be ma-

terial and not merely cumulative." U. S. vs. 72.71 Acres of Land, 23 F.R.D. 635, affirmed, Webb vs. U. S. 273 F. 2d 416.
273 F. 2d 416.

In Elliot & Sons v. King & Co., 22 F.R.D. 280, at page 282, it was said that the District Court should order discovery under Rule 27 even though there is an appeal pending.

In the case of Fried v. McGrath, 133 F. 2 350, Judge Edgerton made the hereinafter quoted observation by granting a new trial on grounds not stated in the original motion, which quotation is set forth in Moore's, Vol. 6, page 3850, as follows:

> "'There is no logical or legal difficulty in granting for one reason a motion made for another reason. And it seems to me a contradiction in terms to say, when a judge grants a party's motion, that he nevertheless acts upon his own motion; or, what comes to the same thing, that he acts of his own initiative. If he grants the party's motion he does not act of his own initiative; and vice versa.' Rule 59(d) clearly expresses this dichotomy: 'the court of its own initiative **may order** a new trial for any reason for which it **might have granted** a new trial on motion of a party . . .'"

In Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2 350, Judge Parker stated as follows:

> "'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.'"

The case of Hagen v. U. S., 9th Circuit, 153 F. 2 850, and Gile v. Duke, 9th Circuit, 5 F. 2 952, the plaintiff was allowed to reopen his case after a nonsuit so as to supply certain defects and omissions in his proof. The fact that the documents in question were recorded in Fallon County would supply a defect, it would give the court an opportunity to reverse its decision on the motion for new trial by granting a new trial in that constructive notice of the recorded rights of the plaintiff would be known to the defendant's predecessors in title. Section 73-201 R.C.M. provides in part as follows:

> "Every conveyance of real property acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees; * * *"

In the case of Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949, at page 951, it was stated as follows (See Sec. 73-201 and 73-202 R.C.M. 1947):

> "In the instant case the option recorded in the Miscellaneous Record Book was recorded as prescribed by law." Stephen v. Patterson, 21 Ariz. 308, 188 Pac. 131.
>
> "Section 6899, Revised Codes 1921, reads as follows:
>
> "Since the option was an instrument entitled to be recorded, and was recorded as prescribed by law, it imparted constructive notice of its contents to Mrs. Guerin, who was a subsequent purchaser of the property affected by the option, from the time it was filed with the county clerk of Toole County on December 9, 1921. Section 6934, above. One who purchases land from the owner, after the recording

of an option given by the owner to another person to purchase the same land, takes with constructive notice of the option, and cannot claim to be an innocent purchaser. Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S.W. 725. The option recited that the right to purchase given to Rock was 'subject, however, to one certain oil and gas lease given in favor of Gordon Campbell,' and that recital constituted a part of the contents of the option as the term 'contents' is used in section 6934 above. Taylor v. Mitchell, 58 Kan. 194, 48 Pac. 859. But Mrs. Guerin was chargeable also with notice of all material facts which an inquiry suggested by that recital would have disclosed. Fisher v. Bush, 133 Ind. 315, 32 N.E. 924; Loser v. Savings Bank, 149 Iowa, 672, 128 N.W. 1101, 31 L.R.A. (N.S.) 1112; 2 Tiffany on Real Property, § 572. She was bound to make inquiry of the owner of the lease, and, if she failed to do so, she is chargeable with notice of all that she would have learned, if she had pursued the inquiry to the full extent to which it led. Crawford v. Chicago, B. & Q. R. Co., 112 Ill. 319; Gaines v. Summers, 50 Ark. 322, 7 S.W. 301. In other words, she was chargeable with notice of the contents of the Campbell lease, though it was not recorded (White v. Foster, 102 Mass. 375; Hancock v. McAvoy, 151 Pa. 439, 25 Atl. 48; 2 Tiffany on Real Property, § 572), and she could not rely upon the representation by Mrs. Thornton that there was not any outstanding lease upon the property (Bergstrom v. Johnson, 111 Minn. 247, 125 N.W. 899; Waggoner v. Dodson, 96 Tex. 415, 73 S.W. 517; 39 Cyc. 1714)."

In Kelly v. Grainey, 113 Mont. 520, 129 P 2d 619, at 626, it is stated as follows:

"In the words of Chief Justice Brantley in Foster v. Winstanley, 39 Mont. 314, 102 P. 574, 579, 'a bona fide purchaser is 'one who at the time of his

> purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside,' ' etc. Helena & Livingston S. & R. Co. v. Northern Pac. R. Co., 62 Mont. 281, 205 P. 224, 21 A.L.R. 1080; Yale Oil Corp. v. Sedlacek, 99 Mont. 411, 43 P. 2d 887.
>
> "Thus, even if we consider defendant's testimony as showing that she received plaintiff's property from Mae J. Kelly in good faith in consideration for a promise to support their mother, she was not a bona fide purchaser so as to defeat plaintiff's title."

The case of United States v. Viewcrest Garden Apartments, (9th Cir. 1959) 268 F. 2 380, holds that the state recording law governs, and stated thusly (on pages 382 and 383):

> "* * * Thus state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved. It is commercially convenient to adopt existing state systems as it saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one set of record books rather than two."

The rule is that any recorded instrument under state law imports notice to any subsequent purchasers or encumbrancers. The recorded contract between plaintiff and McElroy put defendant on notice so that he cannot be a bona fide purchaser.

A partner is charged with knowledge of what the other partner knows. Sec. 63-204 R.C.M. 1947. The terms of the purchase agreement of McElroy on June 17, 1952, are chargeable to Markey. Since Markey is a brother-in-law of appellee Collins Reed, and Buchtel the brother-

in-law of McElroy, it is obvious the chain of title is between business associates and relatives. These parties cannot be bona fide purchasers, especially since they all have notice, actual or constructive, by the recording of the purchase agreement to McElroy, which he assigned to Industrial Gas and which was terminated.

These facts were not known at the time of trial and justice should require complete inquiry into these transfers which appear to be nothing more than a scheme to deprive Mondakota Gas Co. of its oil and gas interests in the Baker Field.

Since present counsel was engaged in this case in December, 1964, many court records have been examined, and in all the Baker Field cases, going back to Federal Power Commission hearings involving the Montana-Dakota Utilities Co., it is noticed that other persons such as Collins Reed herein, are always represented by MDU counsel. The Court knows of the years of litigation between MDU and Capital Gas, Mondakota Gas, John Wight, Inc., and John Wight personally. Will it ever end, or should the Court require, in the furtherance of justice, that discovery into the matter be ordered, to the view of perhaps ending all this litigation, or should the Court permit such schemes as appear in this case to prevail. See briefs of Government counsel (FCC) Lambert McAllister, in case No. 13396, CCA 8th, entitled Montana-Dakota Utilities Co. vs. FCC, Mondakota Gas Co., So. Dakota Pub. Util. Comm., and No. Dakota Pub. Ser. Comm., wherein he stated in his brief, on page 23, as follows:

> "* * * To eliminate this unduly discriminatory 'practice' which enables Petitioner to maintain a monopoly in gas service to North Dakota and Montana points, and likewise discriminatory as to Mondakota Gas Company, the Commission ordered a system-wide rate * * *"

The above case was reported in 169 F. 2 392, decided adverse to MDU, and the U. S. Supreme Court denied cert. reported in 335 U. S. 953, 69 S. Ct. 82, Case 4, on October 25, 1948.

The doctrine of res adjudicata should not have been applied in the instant case because the actions which were dismissed involved parties now deceased, different questions af fact, and different relief from different parties defendant and was in no way an adjudication on the merits of the present controversy. (Tr. p. 224)

Present counsel for the appellant entered that case after it had gone to trial and after a motion for new trial was filed. From review of the records on file herein it is noticed that on August 3, 1964, an Order was filed by the Hon. W. D. Murray wherein he did not disqualify himself pursuant to a request of the general manager of the appellant corporation, who filed the same without assistance of counsel. In view of the request it may be that the trial judge should have disqualified himself, or at least set forth in his order the facts which justify his continuance of hearing the case now before the Court.

> "In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved." U. S. vs. Hardue Hayaski, 282 F 2, 599, 601.

CONCLUSION

The appellant respectfully contends that on the basis of the record after supplying the proof of the recorded chain of title in the appellant that the trial court, in the aid of the appeal, and in aid of the motion for new trial, should have granted the appellant's motion for discovery procedure. In addition, it would appear that under Rule 56, the trial court could have granted summary judgment, and should have granted summary judgment, in favor of the appellant, Mondakota Gas Co., for the reason that the chain of title, as recorded in the County Clerk and Recorder's office at Fallon County, Montana, shows the interest and ownership of Mondakota Gas Co. and the subsequent purchasers and particularly Collins G. Reed could receive only the interest that E. L. McElroy had and that was taken with notice of the prior recorded rights of the appellant. Appellant respectfully contends that the cause should be reversed and remanded for entry of judgment in favor of the Mondakota Gas Co. to the full extent of the interest sought to be transferred by McElroy to Buchtel to Reed, namely: a full 25% royalty interest instead of merely the overriding royalty interest set forth in page 3 of the judgment.

The motion for new trial seeks to show to the Court that there was fraud, failure of consideration, and actual knowledge of the facts by Reed and his predecessors in his chain of title. This, and the recorded contract, would require the court to reach a different conclusion, i.e.: that plaintiff is entitled to judgment for the entire

interest of the Walker lease, subject only to the operating agreement.

Defendant's title is predicated upon his predecessors title and the title of E. L. McElroy stops at the point of the contract of purchase recorded in Fallon County, Montana, being the common grantor, the appellant herein, which contract was terminated and reinvested appellant with his title.

Respectfully submitted,

DARYL E. ENGEBREGSON,
JAMES J. PALMERSHEIM,
Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Daryl E. Engebregson
Attorney for Plaintiff